88-185

Supreme Court, U.S.
FILED
JUL 28 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE UNITED STATES SUPREME COURT

PETER J. PALUGHI, Petitioner

v.

CITY OF MOBILE, A MUNICIPAL CORPORATION; GARY GREENOUGH, LAMBERT MIMS, and ROBERT DOYLE, Individuals, Respondents.

PETITION FOR WRIT OF CERTIORARI

TO THE ALABAMA SUPREME COURT

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PETITION FOR CERTIORARI

TO THE ALABAMA SUPREME COURT

QUESTION PRESENTED FOR REVIEW

WHETHER A MUNICIPALITY IS REQUIRED TO AFFORD A PROPERTY OWNER NOTICE AND AN OPPORTUNITY TO BE HEARD, PRIOR TO CONDEMNATION, WHERE THE MUNICIPAL ENABLING RESOLUTION PROVIDES THAT PROPERTY OTHERWISE SUBJECT TO CONDEMNATION MAY BE EXEMPTED FROM ACQUISITION UPON DETERMINATION BY THE CITY THAT THE PROPERTY HAS BEEN REHABILITATED OR REDEVELOPMENT AND/OR THAT CONDITIONS EXIST TO THE EXTENT THAT THE PROPERTY SATISFIES THE OBJECTIVES OF THE PLAN?

PARTIES

Parties to the proceeding below are set out in the caption of the case.

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PREVIOUS OPINIONS

The matter has twice before the Alabama Supreme Court; first, on petition for writ of mandamus and most recently, on direct appeal. The opinion on mandamus is reported as Ex Parte Palughi, 494 So.2d 404 (Ala. 1986). The opinion on direct appeal is reported as Palughi v. City of Mobile 526 So.2d 1 (Ala. 1988). The opinion on direct appeal is also set out in the Appendix to this petition.

JURISDICTION

The Alabama Supreme Court, by written opinion, Palughi v. City of Mobile, So.2d (1988) affirmed the trial court, rehearing was denied on April 29, 1988. This court has jurisdiction to review by way of petition for writ of certiorari,

the decision of a state court of last resort pursuant to 28 USC Section 1257(3).

CONSTITUTIONAL PROVISIONS STATUTES AND ORDINANCES

1. Fifth Amendment to the Constitution of the United States.

2. Alabama Code (1975) Section 24-3-3.

The text of these provisions is set out in the Appendix to this petition.

STATEMENT OF THE CASE AND FACTS

In December of 1984, the city of Mobile filed a petition in the Probate Court of Mobile County seeking to condemn Appellant's property, located in Fort Conde Village, a historic area of the city. After the hearing, the Probate Court granted the condemnation petition. Appeal was then taken to the Circuit Court of Mobile County. Prior to trial

in the circuit court, this matter was before the Alabama Supreme Court in Ex Parte Palughi 494 So.2d 404 (Alabama 1986), a petition for writ of mandamus. In that proceeding, the Alabama Supreme Court held the trial court erred in severing Appellant's counterclaims and remanded for trial. On October 28, 1986, the court entered a final order of condemnation and awarded Palughi $150,000 for his property.

On December 2, 1986, appeal was taken to the Alabama Supreme Court which affirmed in Palughi v. City of Mobile, 526 So.2d 1 (Ala. 1988), rehearing denied April 29, 1988.

Simply put, this petition asks the court to establish the point when a municipality in the exercise of its powers of eminent domain, moves from acting in a legislative capacity to acting in a judicial capacity, thus triggering the

due process rights of notice and an opportunity to be heard.

Fort Conde Village is a collection of historic structures (with a few modern buildings), located near downtown Mobile Alabama. In 1973, the city acted to revitalize the area which had fallen into a state of decay. The city, together with a local bank, offered various incentives to private individuals to invest in and rehabilitate Fort Conde property. Palughi, a lawyer, was among those responding to the appeal. He purchased and restored a two-story house which he used as living quarters and a law office.

Despite the city's efforts, one by one the commercial ventures in the village failed and by 1983, most of the property in the area vacant and for sale. Palughi's law office, and Rousso's, a restaurant, were two of only a handful of

enterprises left functioning in the area at the time this case arose.

In March 1984, the City of Mobile adopted a municipal resolution, which incorporated the Mobile Community Development Plan for the Fort Conde area. The resolution and the plan which it adopted permitted the city, under appropriate state enabling authority (Alabama Code) 1975 Section 24-3-1, to acquire the property within the development area through the use of the city's eminent domain powers. The land acquired was to be ultimately conveyed to a private developer.

This petition turns on whether the following "exemption" language in the rehabilitation plan afforded Palughi a due process right to notice and opportunity to be heard regarding the exemption of his particular piece of property from the general condemnation.

The plan provided that Fort Conde Village property "... may be exempted from acquisition upon determination by the City of Mobile that said properties have been rehabilitated or redeveloped and/or conditions exist to the extent that property satisfy the objectives of the plan." The redevelopment plan contains no standards or procedures to govern which property is to be exempt from acquisition, nor do they contain a mechanism by which a property owner could seek to demonstrate to the city that his property met the criteria for exemption.

Palughi resisted the taking of his property in informal negotiations with various city officials, and once condemnation was undertaken, he resisted the taking in the Mobile County Probate Court, the Circuit Court of Mobile County, Alabama, and the Alabama Supreme Court. In each of these courts, he

raised the constitutional issue that the exemption language was without standards and afforded no procedure by which he could demonstrate his property qualified for exemption.

Palughi's property was ultimately taken by condemnation while the Rousso's Fort Conde property within the plan boundaries was exempted from acquisition, both without hearings.

REASONS WHY THE WRIT SHOULD BE ALLOWED.

The City of Mobile, acting in its legislative capacity, had the unquestioned right to determine that all of the property within Fort Conde Village, including Petitioner's property, was suitable for redevelopment under the authority granted by Alabama Code (1975) Section 24-3-1 et. seq. Petitioner does not contend such determination exceeded the City's police powers, nor that the property targeted for redevelopment and ultimately acquired was not for a public use. In short, Petitioner has no quarrel with the principles set out in Berman v. Parker, 348 US 26 (1954) and reaffirmed recently in Hawaii Housing Authority v. Midkiff, 467 US 229 (1984).

What sets this case apart from the usual condemnation case, and what makes granting of the writ appropriate, is that the City established an exemption

mechanism for certain otherwise included property in the plan area. The exemption language in the Fort Conde Redevelopment Plan is specific:

> "[Substandard or blighted] properties may be exempted from the acquisition upon determination by the City of Mobile that said properties have been rehabilitated or redeveloped and/or that conditions exist to the extent that said property satisfies the objectives of the plan."

The exemption provision is a legislatively created substantive right which cannot be denied without constitutionally adequate procedures. See Cleveland Board of Education v. Loudermill, 470 US 532 (1985). Having created an entitlement to an exemption for properties satisfying the objectives of the plan, the City implicated the requirements of due process and was required to afford procedural protections

to the Petitioner and all other property owners affected by the redevelopment plan.

An analogous situation can be found in the Cape Code National Seashore Act, 16 USC Section 459b-3(b). There, Congress provided the Secretary of the Interior with authority to acquire property in the exercise of the power of eminent domain. The act created an exemption for "improved property". In United States v. 7.92 Acres of Land, 769 F.2d4 (1st Cir., 1985) the court considered whether the landowner appealing from condemnation was entitled to the "improved property" exemption, there holding that the exemption was not applicable.

The importance of United States v. 7.92 Acres of Land is evident. Because the statue authorizing the exercise of the powers of eminent domain provided for

an exemption, the reviewing court addressed not only the question of public purpose and just compensation, but also the application of the improved property exemption.

Here, Palughi raised the issue of his entitlement to the exemption in correspondence with the City prior to condemnation in the probate court, in the circuit court, and on appeal to the Alabama Supreme Court. The opinion of the Alabama Supreme Court does not address the constitutional issued raised by the exemption language and rehearing was sought in that court solely on the constitutional question. Palughi has never been afforded a forum to demonstrate his property was entitled to the legislatively created exemption.

The fundamental requisites of due process are notice to interested parties and an opportunity to be heard at a

meaningful time and in a meaningful manner. Matthews v. Eldridge, 424 US 319, 335 (1976). The need for some form of pre-condemnation hearing with respect to the exemption provision is evident from a balancing of the competing interest at stake. These are the private interest in protecting and retaining private property, and the public interest in rehabilitation and avoiding unnecessary expenditure of tax dollars. The discretion reflected in the exemption language would be better informed and the risk of error reduced had Petitioner been provided a hearing.

Palughi's right to continued use and enjoyment of his property is deserving of at least the protection afforded a student before suspension, Goss v. Lopez 419 US 565 (1975), or a driver before suspension of his license, Bell v. Burson 402 US 535 (1971), or a welfare recipient

prior to termination of benefits, Goldberg v. Kelly 397 US 254 (1970).

Petitioner should have had an opportunity to demonstrate that his property had been rehabilitated or met the objectives of the redevelopment plan. Because he was denied that right, the condemnation violated his Fourteenth Amendment right to due process of law and should not stand.

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CERTIFICATE OF SERVICE

I hereby certify that I have, on this 28th day of July, 1988, served a true and correct copy of the foregoing document upon John L. Lawler, Attorney at Law, P. O. box 3085, Mobile, Alabama 36652 and James C. Wood, Attorney at Law, 1010 Van Antwerp Building, Mobile, Alabama, 36602 by first class Mail, properly addressed, postage prepaid.

Arthur J. Madden, III

APPENDIX A

THE STATE OF ALABAMA

JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1987-88

Peter J. Palughi

86-310 v.

City of Mobile, et. al.

Appeal from Mobile Circuit Court

SHORES, JUSTICE.

This is an appeal from a condemnation case in which the trial court granted the City of Mobile's December 1984 petition to condemn property of Peter Palughi for use in a downtown redevelopment project. The petition was granted by the Mobile County Probate court, and Palughi appealed to the Circuit Court of Mobile County for a trial de novo. In the Circuit Court, Palughi filed an amended answer, which included numerous affirmative defenses

based on alleged "wrongful condemnation"; a compulsory counterclaim against the City; and a third-party complaint against three former city commissioners. The counterclaim and the third-party complaint were based on the same wrongful condemnation theories as Palughi's affirmative defenses. The case was tried in the circuit court beginning October 20, 1986.

At the close of all the evidence, the trial judge granted the condemnation, and directed verdicts in favor of the three former city commissioners on the third-party complaint. The issue of compensation and the wrongful-condemnation counterclaim were submitted to the jury, and Palughi was awarded $150,000 as compensation. However, the jury could not reach a decision concerning the counterclaim. Consequently, the city filed a motion for

judgment notwithstanding the verdict, as to the counterclaim on the ground of res judicata or collateral estoppel, asserting that the court's decision that the condemnation was lawful barred the jury's consideration of the wrongful-condemnation counterclaim. This motion was granted, and Palughi appealed.

The first issue raised is whether the trial court erred in ruling that the City of Mobile could lawfully condemn Palughi's property. Private property may be condemned if it is being taken for a recognized public use, and the owner is compensated for his loss. Nicrosi v. City of Montgomery, 406 So. 2d 951 (Ala. Civ. App. 1981). Whether a condemnation is for the public good is a question to be determined by the trial court. Section 18-1A-151, Code of Alabama (1975). Therefore, because the Alabama state legislature has recognized downtown

redevelopment projects as promoting the public good and the general welfare (see Section 24-3-1 et seq.), and because Palughi was awarded $150,00 by the jury as compensation, we hold that the trial court was correct in granting the city's condemnation petition.

The second issue presented is whether the trial court erred when it entered a judgment notwithstanding the verdict, in favor of the City on Palughi's counterclaim. This counterclaim was based on the theory that the City's condemnation of Palughi's property was unlawful, the same theory upon which Palughi's unsuccessful affirmative defenses had been based. Consequently, once the court decided, correctly, that the City had the right to condemn, and the jury fixed the compensation award for the taking, there could be no recovery on the counterclaim for

wrongful condemnation.

The final issue raised by Palughi is whether the court entered the order of condemnation before it heard all of the evidence. The basis of this argument is an unsigned, uninitialed, entry on the case action summary sheet which indicates that an order of condemnation was entered on October 20, 1986, the first day of the week-long trial. From this, Palughi argues that the court prejudged his case. We disagree.

Upon learning of the October 20, 1986 entry on the case action summary sheet, the City filed a motion to correct a clerical mistake in accordance with A.R.Civ.P. 60(a). A hearing was held, and the motion was granted. At the hearing, evidence was presented that the October 20 entry was a mistake, and that it was made as the result of the routine procedure followed by the Mobile County

Clerk's office in condemnation cases, rather than at the instruction of the trial court. Furthermore, the case action summary sheet contains a second order or condemnation, entered October 28, at the close of the trial. In contrast to the October 20 order, this October 28 entry was a written order signed by the trial judge.

After reviewing the hearing transcript, we hold that the trial court did not prejudge Palughi's case, and that the court's ruling to allow correction of the case action summary sheet was supported by the evidence. Consequently, the trial court's order of condemnation and the judgment notwithstanding the verdict are due to be affirmed.

AFFIRMED.

Torbert, C. J., and Jones, Adams, and Steagall, JJ., concur.

APPENDIX B

UNITED STATES CONSTITUTION, AMENDMENT V

...nor shall private property be taken for public use, without just compensation.

APPENDIX C

ALABAMA CODE (1975)

Section 24-3-3.

Any urban renewal project undertaken pursuant to Section 24-3-2 shall be undertaken in accordance with an urban renewal plan for the area of the project. As used in this chapter, an "urban renewal plan" means a plan, as it exists from time to time, for an urban renewal project, which plan shall conform to the general plan for the municipality as a whole and shall be sufficiently complete to indicate such land acquisition, demolition and removal of structures, redevelopment, improvements and rehabilitation as may be proposed to be carried out in the area of the urban renewal project, zoning and planning changes, if any, land uses, maximum densities, building requirements and the plan's relationship to definite local

objectives respecting appropriate land uses, improved traffic, public transportation, public utilities, recreational and community facilities and other public improvements. An urban renewal plan shall be prepared and approved pursuant to the same procedure as provided in chapter 2 of this title, with respect to a redevelopment plan. (Acts 1955, No. 553, p. 1210, Section 3.)

(2)

No. 88-188

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FILED
SEP 9 1988
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In The

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October Term, 1988

PETER J. PALUGHI,

Petitioner,

v.

CITY OF MOBILE, A Municipal Corporation; GARY GREENOUGH, LAMBERT MIMS and ROBERT DOYLE, Individuals,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA SUPREME COURT

BRIEF OF RESPONDENTS CITY OF MOBILE, GARY GREENOUGH, LAMBERT MIMS and ROBERT DOYLE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fifth Amendment to the United States Constitution requires that Petitioner, a property owner, be given notice and an individual hearing before condemnation proceedings are commenced so that Petitioner can participate in the City of Mobile's decision-making process and challenge the wisdom of the City's condemnation of his property for use in a downtown urban redevelopment plan?

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STATEMENT OF THE CASE AND FACTS

In December 1984, Respondent The City of Mobile filed a petition in the Probate Court of Mobile County seeking to condemn Petitioner Palughi's property, located in downtown Mobile. At the time, Respondents Lambert Mims, Gary Greenough and Robert Doyle were the City Commissioners. Condemnation of Petitioner's property is part of the City of Mobile's attempt to resurrect its downtown economy, to restore and replace many of its deteriorated and vacant downtown buildings, and to re-establish its downtown area as an asset to (rather than a drain on) the City. (TR-15-16, TR-28, TR-46).

Petitioner has vigorously—and unsuccessfully—opposed the condemnation of his property in every court in which this case has been litigated. In 1985, after five days of trial, the Probate Court of Mobile County granted the City of Mobile's Petition for Condemnation. Petitioner then appealed to the Circuit Court of Mobile County for a trial de novo where, after another week-long trial in which 27 witnesses testified, the Circuit Court ruled that condemnation of Petitioner's property is for a public purpose and that Respondent City of Mobile has the right to condemn Petitioner's property.

After deciding that condemnation of Petitioner's property is for a public purpose, the Circuit Court ruled that Petitioner's "wrongful condemnation" counterclaims against all the Respondents were barred on principles of res judicata and/or collateral estoppel. The rationale for this ruling was that there can be no recovery for "wrong condemnation" where condemnation is for a public pur-

pose. The jury awarded Petitioner $150,000 as compensation for the taking of his property, that amount being the fair market value of the house and land. (R-172).

Petitioner then appealed unsuccessfully to the Alabama Supreme Court, which affirmed the trial court. A copy of the opinion is attached hereto as Appendix A.

Facts

Petitioner lives in and practices law out of a house located on property in Fort Conde Village, which is a collection of historical buildings and some newer buildings in downtown Mobile. The Village is located next to a replica of Fort Conde which was reconstructed by the City in 1976 in conjunction with the bicentennial anniversary of the United States. (TR-43). Respondent City of Mobile spent in excess of five million dollars ($5,000,000.00) to build and finance the construction of the Fort itself (TR-237), and spent another two million dollars ($2,000,000.00) in operational and maintenance expenses on the Fort between 1976 and 1985. (TR-240-241, Exhibit 18).

In late 1983 or early 1984 Respondent City of Mobile surveyed the Village and found that the whole area had deteriorated so badly that forty percent (40%) of the buildings were open to the weather and required extensive renovation, sixty-five percent (65%) of the buildings were unoccupied, and twenty-four percent (24%) of the lots were vacant. (TR-292).

In March 1984, Respondent City of Mobile developed the Fort Conde Redevelopment Plan, which is a general plan, or framework, for redevelopment of the Fort Conde Village—both physically and economically. (TR-199, TR-

296). The plan gives the City of Mobile the authority to acquire any property within the redevelopment area for the purpose of economic development, and also authorizes the City to designate a central management organization —such as a developer—to guide the future activities within the Village during and after redevelopment. (TR-300, City of Mobile Exhibit 3). The redevelopment plan identifies the overall redevelopment area but does not designate which properties within that area the City of Mobile would acquire and which it would not. (TR-301). Nor does the plan specify whether the City or a private developer would actually redevelop the area. (TR-301). The plan gives the City flexibility as to how redevelopment would be achieved, and who would actually redevelop the area. (TR-301). It was drafted without any particular developer in mind and none of the Village property owners—including Petitioner—had any input into the creation of the redevelopment plan or the City of Mobile's decisions concerning which Village properties it would acquire. (TR-302).

The Need for Petitioner's Property

At the time of trial in the Circuit Court of Mobile County, Respondent City of Mobile had spent more than 1.72 million dollars to pay for Village properties it had already acquired. (TR-241). With the single exception of Petitioner's parcel of property, all of the Village properties presently needed for the project have been acquired. There is a small vacant parcel at the rear of a restaurant which the City intends to acquire should the developer need it. (TR-22, TR-24, TR-25, TR-26).

The Respondents have retained a developer who has hired architects, has solicited proposals from construction companies and has hired a firm to develop leasing plans. (TR-439-441, City of Mobile Exhibits 15-17 and 33, 34, 47 and 54). As of October 1, 1986, the developer had incurred expenses of $319,000 on the project (TR-527), but it is unwilling to move forward until Petitioner's property is acquired because that property is essential to the economic viability of the redevelopment project. (TR-456, TR-501, TR-455, TR-458, TR-460, TR-461-462, TR-474-475, TR-505, TR-511, TR-512).

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari should be denied because (1) the precise ground for review asserted by Petitioner has been disposed of by prior United States Supreme Court decisions and, consequently, there is no substantial question, (2) the decision of the Alabama Supreme Court rests on adequate and independent state grounds.

REASONS WHY THE PETITION SHOULD BE DENIED

I. There Is No Substantial Federal Question

Petitioner challenges the constitutionality of the condemnation of his property for use in a downtown redevelopment project. He attempts to resist the inclusion

of his property in the redevelopment plan by claiming that his property "had been rehabilitated or met the objectives of the redevelopment plan." (Petition for Writ of Certiorari, p. 15).

Specifically, in this proceeding Petitioner attempts to resist condemnation by arguing that he was entitled to notice and a hearing, at a point in time *before* the City commenced condemnation proceedings, to argue that his property "had been rehabilitated or met the objectives of the revelopment plan." In short, Petitioner contends he was unconstitutionally deprived of the right to participate in the City's decision-making process as to which properties within the redevelopment area should or should not be acquired. However, this argument is so explicitly foreclosed by prior Supreme Court decisions as to leave no room for controversy. Thus, there is no substantial federal question presented and the petition is due to be denied. See, e.g. *New Orleans Waterworks Co. v. Louisiana,* 185 U.S. 336, 345 (1902); *Equitable Life Assurance Society v. Brown,* 187 U.S. 308, 311 (1902).

It is well settled law that due process does *not* require notice and a hearing prior to the City's institution of condemnation proceedings. The United States Supreme Court has spoken consistently and clearly on this precise issue. In *Sears v. City of Akron,* 246 U.S. 242 (1918), for example, a property owner attacked the constitutionality of a state statute granting the power of eminent domain to the City of Akron, asserting that affected property owners were excluded from the decision-making process. The United States Supreme Court flatly rejected this argument, which is identical to Petitioner's:

> Petitioner contends that the ordinance is void because the general statute which authorized the appropriation violates . . . the Fourteenth Amendment, in that it authorized the municipality to determine a necessity for the taking of private property without the owners having an opportunity to be heard as to such necessity . . . It is well settled that while the question whether the purpose of a taking is a public one is judicial . . . The necessity and the proper extent of a taking is a legislative question.

246 U.S. at 251.

Seven years later the United States Supreme Court reaffirmed its position. In *North Laramie Land Co. v. Hoffman,* 268 U.S. 276 (1925), the court rejected the due process argument identical to Petitioner's that procedural due process requires notice and an opportunity to be heard before the commencement of condemnation proceedings:

> There remains for consideration the plaintiff's objection . . . that plaintiff was afforded no opportunity for a hearing before the appraisers or the board of county commissioners with respect either to the location of the road or the damage suffered by plaintiff by the opening of the road. The taking of property provided for by the statute is a taking of land under the direction of public officers for a public use . . . *The necessity and expediency of the taking of property for public use are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process in the sense of the Fourteenth Amendment.*

268 U.S. at 284 (emphasis added).

Both *Sears v. City of Akron,* supra, and *North Laramie Land Co. v. Hoffman,* supra, remain controlling authorities and have been so recognized in more recent de-

cisions by lower courts. *Joiner v. City of Dallas,* 380 F. Supp. 754 (N.D. Texas 1974) is an example. In reviewing the constitutionality of a state condemnation statute which did not provide for a public hearing prior to the Dallas City Council's decision to condemn private property, the court held:

> Focusing now upon the eminent domain statutes, plaintiffs first attack the absence of certain procedural requirements accompanying the process by which the condemnor makes the decision that appropriation of private property is necessary. *Plaintiffs argue that condemnors should be required to give actual notice to property owners that their property might become the subject of condemnation proceedings, to conduct public hearings on the issue of condemnation, to conduct planning studies, and to record their proceedings for public examination and review.* The simple answer to plaintiffs' argument lies in the well settled body of case law that we have previously discussed.[17] *Together these decisions instruct us that because the condemning authority's decision regarding the need for a taking and the property to be taken is fundamentally legislative, landowners have no right to participate in that decision or to litigate the decision to condemn on general constitutional grounds.*

380 F. Supp. at 769 (emphasis added).

Footnote 17, contained in the above quote, refers to "Part III A" of the opinion and is located at 380 F. Supp. at 764. The relevant portion of "Part III A" reads:

> That the power of eminent domain must be exercised in accordance with due process of law is an explicit requirement under the Fourteenth Amendment. The perimeters of the due process requirement in eminent domain proceedings have been sharply defined through a series of Supreme Court decisions, however, and the

customary "due process" attack has limited chance of success. For example, the Court has repeatedly characterized the condemnors' decision on the necessity for a taking and the quantity to be appropriated as legislative and has, therefore, denied to landowners the right to participate in that decision-making process or to litigate on federal constitutional grounds the decision to condemn private property. See *United States v. Welch*, 327 U.S. 546, 557, 66 S. Ct. 715, 90 L. Ed. 846 (1946), (Reed, J., concurring); *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 284, 45 S. Ct. 491, 69 L. Ed. 953 (1925); *State v. City of Chattanooga*, 264 U.S. 472, 483, 44 S. Ct. 369, 68 L. Ed. 796 (1924); *Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 708, 43 S. Ct. 689, 67 L. Ed. 1186 (1923); *Joslin Co. v. Providence*, 262 U.S. 668, 678, 43 S. Ct. 684, 67 L. Ed. 1167 (1923); *Bragg v. Weaver*, 251 U.S. 57, 58, 40 S. Ct. 62, 64 L. Ed. 135 (1919); *Sears v. City of Akron*, 246 U.S. 242, 251, 38 S. Ct. 245, 62 L. Ed. 688 (1918); *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 65, 33 S. Ct. 667, 57 L. Ed. 1063 (1913); *Adirondack Ry. Co. v. New York*, 176 U.S. 335, 349, 20 S. Ct. 460, 44 L. Ed. 492 (1900); *Backus v. Fort Street Union Depot Co.*, 169 U.S. 557, 568, 18 S. Ct. 445, 42 L. Ed. 853 (1898); *United States v. Gettysburg Elect. Ry. Co.*, 160 U.S. 668, 685, 16 S. Ct. 427, 40 L. Ed. 576 (1896); *Sweet v. Techel*, 159 U.S. 380, 393-395, 16 S. Ct. 427, 40 L. Ed. 188 (1895); *Shoemaker v. United States*, 147 U.S. 282, 298, 13 S. Ct. 361, 37 L. Ed. 170 (1893); *Boom Co. v. Patterson*, 98 U.S. 403, 406, 25 L. Ed. 206 (1878); see also *Berman v. Parker*, 348 U.S. 26 (1954).

(Emphasis added).

Petitioner bases his argument that he was entitled to participate in the City's decision-making process as to which properties would and would not be acquired on the following clause in the Fort Conde Redevelopment Plan: "Such properties may be exempted from acquisition upon

determination by the City of Mobile that said properties have been redeveloped and/or that conditions exist to the extent that said properties satisfy the objectives of the plan." This clause, upon which Petitioner so heavily relies, does no more than re-state the well established law that the decision to condemn or not condemn particular parcels within the redevelopment area is within the sound discretion of the City. The clause merely preserves the City's authority to choose which properties will and will not be condemned. It does not provide for, require or authorize property owner participation in this determination and, in fact, there was no property owner participation in this determination.

Whether Petitioner's land was necessary for the redevelopment plan was a question within the City of Mobile's sound discretion and Petitioner had no right to a hearing before the City Commission to oppose the wisdom or necessity of condemnation. As this court stated in *Berman v. Parker,* 348 U.S. 25, 36 (1954):

> It is not for the Courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the Legislative Branch.

See also *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229 (1984).

Petitioner has failed to cite a single case where the procedural argument he raises was decided in favor of a property owner. The complete lack of legal authority to

support the Petition for Writ of Certiorari stands in stark contrast to the legion of United States Supreme Court cases and lower court cases cited herein by the Respondents which dispose of the precise procedural argument Petitioner asserts.

II. The Alabama Supreme Court Based Its Decisions On Independent And Adequate And Independent State Grounds

The Alabama Supreme Court affirmed the trial court and held that condemnation of Petitioner's property was for a "public purpose" as required by Alabama statute. Specifically, the Alabama Supreme Court stated:

> The first issue raised is whether the trial court erred in ruling that the City of Mobile could lawfully condemn Palughi's property. Private property may be condemned if it is being taken for a recognized public use, and the owner is compensated for his loss. *Nicrosi v. City of Montgomery,* 406 So. 2d 951 (Ala. Civ. App. 1981). Whether a condemnation is for the public good is a question to be determined by the trial court. Section 18-1A-151, Code of Alabama (1975). *Therefore, because the Alabama state legislature has recognized downtown redevelopment projects as promoting the public good and the general welfare (see Section 24-3-1 et seq.),* and because Palughi was awarded $150,000 by the jury as compensation, *we hold that the trial court was correct in granting the city's condemnation petition.*

Appendix A, page App. 2 (emphasis added).

It is essential to note that Petitioner has never challenged the constitutionality of any of the state condemnation statutes pursuant to which the Fort Conde Redevelopment Plan was adopted. None of these statutes provides

or requires that Petitioner be given notice and an individual hearing *before* the time condemnation proceedings are commenced in the Probate Court. Since the applicable condemnation statutes do not require notice and an individual hearing before the commencement of condemnation proceedings, and the City, relying on these statutes, provided Petitioner no individual hearing, then Petitioner cannot logically argue that the City's action is unconstitutional while the statutes are not. In short, Petitioner cannot attack the actions of the Respondents without attacking the Alabama condemnation statutes which authorize those actions.

The Alabama Supreme Court expressly held that the taking of Petitioner's property was permissible under the applicable Alabama condemnation statutes. Since the decision of the Alabama Supreme Court rests on state condemnation statutes which Petitioner has never challenged, the Alabama Supreme Court's decision is based on adequate and independent state grounds and the Petition for Writ of Certiorari is due to be denied. *Herb v. Pitcairn,* 324 U.S. 117, 125-26 (1945); *Fox Film Corp. v. Muller,* 296 U.S. 207, 210 (1935); *Klinger v. Missouri,* 13 Wall. 257, 263 (1871).

It is also important to note that Petitioner's argument (i.e., that he was entitled to notice and an individual hearing before the commencement of condemnation proceedings) is based *solely* on a single clause in the Ft. Conde Redevelopment Plan. Thus, it is clear that the procedural question Petitioner raises arises out of the unique facts of this particular case—i.e., a *single* clause in a *local* urban redevelopment plan. Therefore, the Petition for Writ of Certiorari is due to be denied because this case, although

important to the parties involved, presents no issue which is substantial enough in terms of importance to the general public to warrant review on the merits by the United States Supreme Court. See, *Layne & Bowler Corp. v. Western Wellworks,* 261 U.S. 387, 393 (1923); *Rice v. Sioux City Cemetary,* 349 U.S. 70, 79 (1955).

—o—

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
OCTOBER TERM, 1987-88

Peter J. Palughi

86-310 v.

City of Mobile, et. al.

Appeal from Mobile Circuit Court

SHORES, JUSTICE

This is an appeal from a condemnation case in which the trial court granted the City of Mobile's December 1984 petition to condemn property of Peter Palughi for use in a downtown redevelopment project. The petition was granted by the Mobile County Probate court, and Palughi appealed to the Circuit Court of Mobile County for a trial de novo. In the Circuit Court, Palughi filed an amended answer, which included numerous affirmative defenses based on alleged "wrongful condemnation"; a compulsory counterclaim against the City; and a third-party complaint against three former city commissioners. The counterclaim and the third-party complaint were based on the same wrongful condemnation theories as Palughi's affirmative defenses. The case was tried in the circuit court beginning October 20, 1986.

At the close of all the evidence, the trial judge granted the condemnation, and directed verdicts in favor of the three former city commissioners on the third-party complaint. The issue of compensation and the wrongful-con-

demnation counterclaim were submitted to the jury, and Palughi was awarded $150,000 as compensation. However, the jury could not reach a decision concerning the counterclaim. Consequently, the city filed a motion for judgment notwithstanding the verdict, as to the counterclaim on the ground of res judicata or collateral estoppel, asserting that the court's decision that the condemnation was lawful barred the jury's consideration of the wrongful-condemnation counterclaim. This motion was granted, and Palughi appealed.

The first issue raised is whether the trial court erred in ruling that the City of Mobile could lawfully condemn Palughi's property. Private property may be condemned if it is being taken for a recognized public use, and the owner is compensated for his loss. *Nicrosi v. City of Montgomery*, 406 So. 2d 951 (Ala. Civ. App. 1981). Whether a condemnation is for the public good is a question to be determined by the trial court. Section 18-1A-151, Code of Alabama (1975). Therefore, because the Alabama state legislature has recognized downtown redevelopment projects as promoting the public good and the general welfare (see Section 24-3-1 et seq.), and because Palughi was awarded $150,000 by the jury as compensation, we hold that the trial court was correct in granting the city's condemnation petition.

The second issue presented is whether the trial court erred when it entered a judgment notwithstanding the verdict, in favor of the City on Palughi's counterclaim. This counterclaim was based on the theory that the City's condemnation of Palughi's property was unlawful, the same theory upon which Palughi's unsuccessful affirmative de-

fenses had been based. Consequently, once the court decided, correctly, that the City had the right to condemn, and the jury fixed the compensation award for the taking, there could be no recovery on the counterclaim for wrongful condemnation.

The final issue raised by Palughi is whether the court entered the order of condemnation before it heard all of the evidence. The basis of this argument is an unsigned, uninitialed, entry on the case action summary sheet which indicates that an order of condemnation was entered on October 20, 1986, the first day of the week-long trial. From this, Palughi argues that the court prejudged his case. We disagree.

Upon learning of the October 20, 1986 entry on the case action summary sheet, the City filed a motion to correct a clerical mistake in accordance with A.R.Civ.P. 60 (a). A hearing was held, and the motion was granted. At the hearing, evidence was presented that the October 20 entry was a mistake, and that it was made as the result of the routine procedure followed by the Mobile County Clerk's office in condemnation cases, rather than at the instruction of the trial court. Furthermore, the case action summary sheet contains a second order of condemnation, entered October 28, at the close of the trial. In contrast to the October 20 order, this October 28 entry was a written order signed by the trial judge.

After reviewing the hearing transcript, we hold that the trial court did not prejudge Palughi's case, and that the court's ruling to allow correction of the case action summary sheet was supported by the evidence. Consequently, the trial court's order of condemnation and the

judgment notwithstanding the verdict are due to be affirmed.

AFFIRMED.

Torbert, C. J., and Jones, Adams, and Steagall, JJ., concur.